

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

ROBERT STEVEN JONES,

Defendant.

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)
) CASE NO. 3:16-CR-026-TMR
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)
) SENTENCING
)
) VOLUME I
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE **THOMAS M. ROSE**,
UNITED STATES DISTRICT JUDGE, PRESIDING
WEDNESDAY, JUNE 27, 2018
DAYTON, OH

APPEARANCES:

For the Plaintiff:

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

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1 P-R-O-C-E-E-D-I-N-G-S 1:47 P.M.

2 THE COURT: We are before the Court in the matter of
3 the United States of America versus Robert Steven Jones. This
4 is Case Number 3-16-cr-26. The Court previously convened the
5 matter for the purposes of hearing the pending motions. The
6 Court has also entertained in chambers upon the record
7 exhibits or evidence that is being presented to the Court for
8 the purposes of disposition that the Court found to be
9 necessary and appropriate presentation in that form.

10 The Court now stands ready to proceed or continue with
11 the dispositional hearing. The Court's plans are to deal with
12 the initial information that the Court will share with the
13 record. The Court understands that there are some objections
14 to be heard. There are also some preliminary presentations
15 that counsel wishes to present in addition to the exhibits
16 that the Court has already been presented.

17 The Court will be then, after listening to those
18 arguments and those presentations, the Court will be taking
19 the matter under advisement, will be setting a time certain in
20 which time the Court will come back, render its rulings and
21 findings with regard to any issues that are before the Court,
22 and will proceed and complete disposition at that point.

23 So I guess for the purposes of clarification, again,
24 would counsel enter their appearance for the record.

25 MR. PATEL: Good afternoon, Your Honor. Vipal Patel

1 and Amy Smith for the United States; accompanied by the case
2 agent, FBI Special Agent Andrea Kinzig.

3 MR. RION: Jon Paul Rion for Mr. Jones.

4 THE COURT: Previously, on September the 25th, 2017,
5 the defendant entered a plea of guilty to Counts 1 through 7
6 and 9 through 11, as well as Count 13 of the Superseding
7 Indictment pursuant to a Plea Agreement. The Court accepted
8 the pleas to those counts and referred the matter to the
9 probation department for a presentence investigation.

10 The Court has received the resulting report and
11 recommendation from probation and does stand ready to proceed,
12 but would first confirm with counsel that they are in receipt,
13 of course, of the report and its recommendations, have had the
14 opportunity to review such, and then the Court will be
15 prepared to entertain argument or presentation with regard to
16 objections that the Court does understand are now pending.

17 So, Mr. Patel.

18 MR. PATEL: Yes, Your Honor, we have received and
19 reviewed the PSR.

20 THE COURT: It's my understanding the government at
21 this point in time doesn't have objections to the PSI. The
22 government does have some, I guess, argument with regard to
23 disposition concerning -- concerning the Court's consideration
24 of the factors and the offense levels, criminal history
25 category; is that correct?

1 MR. PATEL: That's right, Your Honor.

2 THE COURT: Mr. Rion.

3 MR. RION: Your Honor, there is a few objections.
4 The one I want to draw the Court's attention to and argue is
5 there was a 2-point enhancement for obstruction of justice.
6 If you look at Application Note 5, Subsection B, it does
7 indicate that simply making a false statement, not under oath,
8 to law enforcement generally is not the type of conduct that's
9 covered.

10 In this case, from looking at the Government's Exhibits
11 in 3, 4, and 5, I think the allegation is that after police
12 become involved Mr. Jones has phone conversation or text
13 conversation with various people that he was involved with.
14 And when asking them whether or not they have talked to their
15 parents and/or law enforcement or things like that, there is a
16 suggestion or discussion that's had about maybe not disclosing
17 that information. So it seems as if making a false statement
18 not under oath wouldn't apply of asking another person to make
19 a false statement that's not under oath also wouldn't apply.

20 So that was the main argument. Plus it was after the
21 fact, these statements, after the person had either spoken to
22 their parent and/or law enforcement, they are lamenting the
23 cooperation while trying to direct them to either do so or
24 not. So that's that argument.

25 As relates to paragraph 179, again, two of the counts

1 that carry the life sentence, I guess in the big picture of
2 this case, may not necessarily be the most serious counts as
3 far as the conduct that's involved. And so those counts, you
4 know, they have a life sentence. The guideline range for
5 those counts isn't necessarily -- well, isn't a life sentence.
6 It's only the enhancements on the other counts that don't
7 carry life that end up transferring over here.

8 So it could be argued under 3553(a) as well, but I think
9 it just shows that looking at the counts itself and the
10 guideline range for those counts as the legislature and the
11 guideline commission sees the seriousness of those offenses,
12 you couldn't get to a life sentence on those two counts and
13 the other two counts because of the guidelines. And on the
14 other counts, you can't get to a life sentence because of
15 statutory restrictions. So that's that argument. I really
16 don't have any evidence for it except what's been put on.
17 It's just argument.

18 I think we have already dealt with the issue as it
19 relates to the registration. The Court's already made a
20 ruling at that hearing already on that point. I am not going
21 to re-argue it.

22 The only other part is he was placed in a category V
23 and -- but to the conduct maybe that was relied upon to get
24 him to a category V was conduct that may have occurred when he
25 was a juvenile. So I'd just like the Court to consider that.

1 THE COURT: Thank you.

2 Mr. Patel, Ms. Smith.

3 MR. PATEL: Yes, Your Honor. Your Honor, if I may
4 take the issues in turn, dealing first with the obstruction of
5 justice enhancement.

6 I'd first point out that in the calculations under the
7 sentencing guideline, that enhancement or that adjustment,
8 technically more accurate, only applies once, and that's with
9 respect to Count 3 which involves Minor -- what's been
10 referred to as Minor A. The reason, the factual underpinnings
11 as explained by the probation officer is that Mr. Jones
12 attempted to suborn perjury.

13 To dig down even further, Your Honor now has before him a
14 binder of certain communications between Mr. Jones and various
15 teenage girls. One of them is Minor A. If I may direct your
16 attention, Your Honor, to Exhibits 3, 4, and 5 of the exhibit
17 binder, these are to what I was just referring. These are the
18 communications between Mr. Jones and Minor A. And the
19 sequence and the substance, of course, is quite telling. The
20 first one marked as Government's Exhibit 3 actually occurred
21 just prior to the interview. There was an interview set up
22 between the FBI and Minor A, and what's going on is Mr. Jones
23 and Minor A are having preinterview conversations about it via
24 messaging. The text speaks for itself.

25 And in Exhibit 3, there is nothing overt where in this

1 particular conversation Mr. Jones is directly instructing or
2 telling Minor A to lie to the FBI. Instead, it's much more
3 subtle. They are talking about the interview. Mr. Jones is
4 expressing love. This, once the Court has an opportunity to
5 review this in full, I am sure the Court will come to the
6 appreciation or realization the same that I did, which is that
7 this is grooming. It's the classic style of grooming where
8 the defendant is seeking to have or impress upon Minor A
9 that -- a sense of love and affection during the same time
10 that -- when he knows full well that Minor A will be speaking
11 with the FBI very shortly.

12 In fact, it boards on the part of influencing the
13 witness's statements to the FBI where, if you look on the very
14 first page of Exhibit 3, or at least the first page of the
15 actual transcripts, about a third of the way down there is a
16 statement by Mr. Jones, represented by Xolker, by the way --
17 X-O-L-K-E-R -- telling the minor, "I would just not say
18 anything, to be honest." Referring to the meeting about to be
19 held between the FBI and Minor A.

20 All right. More direct comes after the interview. And
21 after the interview there is a postmortem. That's marked as
22 Government's A. It's sort of a recap, okay, of what happened
23 during the interview. During that conversation, it's not so
24 subtle anymore. Your Honor could look at the third page of
25 the exhibit. This is actually the second page of the actual

1 transcript. We have taken the liberty of highlighting in
2 yellow the pertinent section of the conversation. But, once
3 again, we have Mr. Jones and Minor A communicating, having an
4 extensive conversation about the interview. And then at one
5 point during the conversation the following occurs:

6 "Mr. Jones: If you get a chance or have to testify, say it
7 was another guy. But you didn't want to say because you
8 didn't want me to find out you cheated."

9 If that wasn't enough, he followed it up with the next
10 statement, "And that you lied to the FBI about it being me."

11 That is not grooming. That is not a subtle pressure.
12 That is a simple and straightforward instruction/directive to
13 a minor who is already under the influence of Mr. Jones to
14 alter or, if she has an opportunity to testify or speak with
15 them again, to say something different than what she just told
16 the FBI.

17 That, Your Honor, is not simply declining to speak to the
18 FBI, exercising of rights. It's not simply Mr. Jones giving a
19 false statement. That goes beyond that type of level of
20 activity. It is a direct attempt to influence what could have
21 happened in this court under oath, which is testimony from a
22 minor victim, and an attempt by Mr. Jones to alter what that
23 person had to say. That's classic, classic obstruction of
24 justice.

25 Now, I should point out that, as I started this

1 conversation, Your Honor, this has to do with one count that
2 ultimately doesn't go towards the ultimate calculation of the
3 sentencing guidelines. There is a rule, a provision in the
4 rules that allows Your Honor to decide that it's not going to
5 decide this, because if the Court makes a determination that
6 it just does not materially alter or it will not alter the
7 sentencing guideline calculations or the Court's imposition of
8 sentence, the Court can invoke that right under the rules and
9 decline to rule. We don't feel that's necessary because we
10 feel there's sufficient evidence to support the probation
11 officer's conclusion even though ultimately it is academic in
12 its effect.

13 Turning to the other objection, which has to do with a
14 life sentence, or the life recommendation. There are indeed,
15 as counsel pointed out, two counts at play here where a life
16 sentence is possible. That is Counts 3 and 6. The statutory
17 penalties for those are ten years up to life.

18 As to the bulk of the other counts, Counts 1, 2, 4, 5, 7,
19 9, 10, and 11, the statute of parameters for each count are 15
20 years up to 30 years. That's essentially 240 years, if I'm
21 doing my math correctly, of potential sentence because all
22 those counts could, in the Court's discretion, run
23 consecutively. So, in essence, the statutory parameters as
24 set forth by Congress are 240 years, plus two life terms, plus
25 10 years. Two life terms, 240 years, plus 10 years. Congress

1 has given sufficient leeway for the sentencing commission to
2 do what it did, which was to find that the overall guideline
3 calculation, taking into account all the sentencing factors,
4 should in this case be life. And that's the way the
5 sentencing guidelines work.

6 The sentencing commission clearly feels that that is just
7 because that's the way that they have calculated Mr. Jones's
8 guidelines. And given that there are two life terms at play,
9 plus another 240 years, plus 10, it's difficult to envision
10 how a life term calculated by the commission and the
11 guidelines is unjust.

12 Your Honor, we'll leave it at that with respect to the
13 guideline calculations because I think that's all that's at
14 issue, and will reserve our full discussion of 3553(a) factors
15 when the time is appropriate, with the Court's permission.

16 THE COURT: Mr. Rion, obviously they are your
17 objections. Final word?

18 MR. RION: I don't want to be repeating myself. I
19 think the application notes apply.

20 THE COURT: Mr. Patel, I would like to hear -- I
21 know you filed something just recently with regard to the
22 Court's -- the issue with regard to acceptance and timely
23 notification, or acceptance anyway. For the Court's
24 edification, while it considers all of everything that is
25 being presented to it before it makes its final determination,

1 I would just like to hear a summary of that or a presentation
2 of that argument.

3 MR. PATEL: Certainly, Your Honor.

4 The probation officer in its -- the probation office in
5 its presentence investigation report recommended that the
6 defendant be afforded the acceptance of responsibility and
7 timely notification points. That's set forth on page 25,
8 paragraphs 180 and 181.

9 Now, that recommendation occurred, as far as I'm aware,
10 prior to the time that the defendant filed even his first
11 motion to withdraw. After that, that motion that was unclear,
12 the Court may recall, that the defendant was seeking to
13 withdraw only his guilty plea as to Count 13 or as to all of
14 the counts. I believe the Court inquired, and I believe
15 counsel responded, that there was some argument they were
16 making that it was as to all of the counts.

17 We were unclear, Your Honor, and essentially was willing
18 at that point to give the defendant the benefit of the doubt
19 and not make a point about acceptance of responsibility at
20 that point because, frankly, it was unclear as to whether he
21 was seeking to withdraw as to all counts or not.

22 That clearly resolved itself six days ago when the
23 defendant has yet again moved to withdraw his guilty pleas,
24 and this time he is seeking, no doubt -- or sought to withdraw
25 his guilty pleas as to all counts. That acceptance of

1 responsibility adjustment is designed to afford somebody who,
2 according to the terms of the application or the guideline,
3 has clearly, clearly demonstrated an acceptance of
4 responsibility for his offense.

5 I just can't see how somebody has clearly accepted
6 responsibility for his offense when they not just once but
7 twice seek to withdraw from it. Acceptance of responsibility
8 means doing what he did at the time of his guilty plea,
9 acknowledging that he did each and every essential element of
10 the crime. He did that, the acceptance of responsibility,
11 when he pled guilty. He reversed that when he sought
12 permission from Your Honor to redo that, to undo that guilty
13 plea.

14 He -- as Your Honor is aware, there is a two-part
15 component to the acceptance of responsibility adjustment.
16 There is a minus 2-level reduction for acceptance of
17 responsibility, and technically when we call it acceptance of
18 responsibility, we group together, in common parlance, the
19 minus 2 adjustment plus -- and the minus 1 adjustment for
20 timely notification.

21 As a technical matter, that minus 1 adjustment requires a
22 motion from the government. Our Plea Agreement requires the
23 government to do none of this. We are not obligated to
24 recommend or make any recommendations with regard to
25 acceptance of responsibility or timely notification, and nor

1 do we.

2 The timely notification adjustment is designed to save
3 the government resources, not just to prepare for -- while
4 preparing for trial, and also to permit the government to
5 allocate resources elsewhere efficiently. Instead, we have
6 been allocating resources dealing with Mr. Jones's twice now
7 motions to withdraw.

8 It just seems to the United States that it's
9 counterintuitive, contrary to the law, and contrary to the
10 facts to grant someone a reduction in the guidelines when they
11 are to this day saying I should not -- I should be relieved
12 from my guilty plea.

13 This again, though -- I am obligated to point out that
14 this yet is another one of those calculations, though, that
15 ultimately is academic. It makes for a nice law school exam
16 and -- but in practical terms, whether the acceptance of
17 responsibility adjustment or the timely notification
18 adjustment is granted, it doesn't matter. And I point that
19 out in our papers that the sentencing guidelines max out at
20 43. He is well above that. The guidelines calculated scored
21 him at a 51. And so whether the 3-point adjustment is given,
22 we are talking 51 or 48, which then ultimately gets reduced to
23 43 no matter what. So under any calculation, whether Your
24 Honor grants the acceptance of responsibility or not, or
25 declines to make a ruling under the same provision I referred

1 to previously, the end result is the same, 43, and it's still
2 life.

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 Do you want to be heard on that, Mr. Rion?

6 MR. RION: Your Honor, acceptance of responsibility
7 according to the guidelines is responsibility for all his
8 involvement in the offense of conviction. Never once has
9 Robert Jones attempted to tell this Court that he's not
10 responsible for the conduct except for when a document was
11 provided to counsel after the pleas were made, and it had to
12 do with the terms of the registration. And that was the full
13 extent of the argument. It wasn't that he wasn't supposed to
14 register, it was the terms of the registration.

15 At the time the plea was entered, the government was
16 alleging that he was facing a lifetime registration
17 requirement. I think it was shown later, arguably, that it
18 was a limited registration requirement. So the argument that
19 was raised had nothing to do with the argument made against
20 acceptance of responsibility. It had do with acceptance of
21 responsibility after that plea was entered.

22 On that second motion, on the second motion to vacate
23 that he filed, the issue dealt with testimony that came
24 through an agent that was required by the defendant after the
25 plea was made where that agent seemed to go into some further

1 description of the distinction between the nit itself and the
2 mechanism in which the nit could gain access to a computer.
3 It had nothing to do with his acts or his involvement. It had
4 to do with a technical point that came to his attention after
5 the fact.

6 So I don't think that the government can really state
7 that he has not accepted responsibility. He pled to
8 essentially every major count in the Indictment. He hasn't
9 done anything in the PSR to refute the factual basis of that.
10 And, frankly, it's beyond question that he hasn't tried to cut
11 hairs as to his acts.

12 THE COURT: All right. Thank you.

13 Final word?

14 MR. PATEL: No, Your Honor.

15 THE COURT: Well, the Court's going to take this all
16 under advisement. I have been provided here today a number of
17 different things that the Court needs to consider and needs to
18 look at. The Court does plan, however, to reset this. I
19 believe we are going to reset it with counsel's calendar as
20 quickly as we can. However, the Court does plan at that point
21 in time to go through its regular process and procedure with
22 regard to a disposition.

23 I will at that time, however, even though we had
24 arguments and we had presentations here today, the Court does
25 also plan, again, to afford an opportunity for counsel and, of

1 course, Mr. Jones, an opportunity to make any presentation
2 they so desire at that time before the Court renders its final
3 decision.

4 So we will try to set it as quickly as we can. The Court
5 just needs some time because I have been presented arguments
6 and documents which I need to consider in making a
7 determination.

8 Anything further to come before the Court today?

9 MR. PATEL: Nothing, Your Honor.

10 MR. RION: No. Thank you for your time, Judge.

11 THE COURT: We will set a time as quickly as we can.
12 Thank you very much.

13 THE COURTROOM DEPUTY: All rise. This court stands
14 in recess.

15 (Proceedings concluded at 2:14 p.m.)
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CERTIFICATE OF REPORTER

I, Mary A. Schweinhagen, Federal Official Realtime Court Reporter, in and for the United States District Court for the Southern District of Ohio, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

s/Mary A. Schweinhagen

November 5, 2018

MARY A. SCHWEINHAGEN, RDR, CRR
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